(33)

Supreme Court of the United States

No. 734

BASIL GOULANDRIS, NICHOLAS GOULANDRIS and LEONIDAS GOULANDRIS, doing business as GOULANDRIS BROS.,

Petitioners,

against

THE AMERICAN TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY, LIGGETT & MYERS TOBACCO COMPANY, INC., BANK OF GREECE, LEKAS & DRIVAS, INC., POMPEIAN OLIVE OIL CORPORATION, and VICTOR CORY, an individual doing business as VICTOR CORY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

I. MAURICE WORMSER AND
REID, CUNNINGHAM & FREEHILL,
Counsel for Petitioners.

Dated, May 5, 1944.

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CITATIONS.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners above named respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review the decision of said court rendered February 10, 1944 (R. 64-70), affirming the decree of the United States District Court for the Southern District of New York (R. 57-58; 50 F. Supp. 452). The opinion of the Circuit Court of Appeals (R. 64) is reported at 140 Fed. (2d) 780.

I.

Summary Statement of the Matter Involved.

The S. S. *Ioannis P. Goulandris,* a Greek flag vessel owned by petitioners, loaded tobacco at Smyrna, Turkey, to be carried to the United States via Gibraltar, but on account of the outbreak of war between Greece and Italy on October 28, 1940, was ordered to proceed via Suez and Cape of Good Hope (R. 3, 4). Owing to the length of the voyage, delay occasioned in part by compliance with orders of the British Admiralty and a fire, the vessel arrived here on May 3, 1941 with her cargo damaged (R. 40). Shortly before arrival, the vessel was requisitioned by the Greek Government (R. 9) and the funds of her owners, on deposit in the United States, were frozen by virtue of an executive order of the President (R. 55). Claims and suits were thereafter filed against the owners for sums in excess of $1,000,000 (R. 5).

On November 3, 1941, within six months after written notice of claim was first given, a petition stating the facts and praying exoneration from or limitation of liability was duly filed pursuant to the Act for Limitation of Vessel Owner's Liability, Rev. St. 4281-4289; 46 U. S. C. 181-189 (R. 1-13). Respondents appeared and moved to dismiss the petition upon the ground that petitioners had not, within the prescribed time for the filing of the petition, transferred to a trustee or deposited the value of their interest in vessel and freight, or given security therefor (R. 31-39).

The District Court granted that motion and dismissed the petition holding that the 1936 amendment of the statute (46 U. S. C. 185) must be construed as requiring the limitation fund to be provided before, and not after, the period specified in the statute for the filing of the petition (R. 42-44, 56).

The Circuit Court of Appeals, although seemingly disagreeing with the District Court's construction of the statute, affirmed the decree upon the ground that the statutory requirement was not satisfied unless something further was done during the prescribed time for the filing of the petition, such as an application for an order for a due appraisement of the owner's interest in the vessel and her pending freight and that in reality the petition filed was a mere notice of intention to initiate a proceeding for limitation of liability at some future time (R. 66-70).

II.

Basis of Jurisdiction.

Jurisdiction of this court is invoked under Section 240 a of the Judicial Code, as amended (U. S. C. A. Title 28, Section 347 a).

III.

Questions Presented.

Is a proceeding for limitation of a vessel's owner's liability duly initiated when a petition, stating the facts and circumstances on which limitation of liability is sought with a prayer for relief in that behalf, is filed within the six-month period prescribed in the 1936 amendment of the Statute (46 U. S. C. 185).

IV.

Reasons Relied Upon for Allowance of the Writ.

1. The Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court. Moreover, the decision is in probable conflict with the decisions construing the amendment of the statute involved of the Circuit Court of Appeals for the Fourth Circuit in *Standard Wholesale P. &*

A. Works v. *Travelers Ins. Co.*, 107 Fed. (2d) 373; *The Fred Smartley, Jr.*, 108 Fed. (2d) 603; *The Bright*, 38 Fed. Supp. 574 (affd. 124 Fed. [2d] 45), and in direct conflict with the decision of a District Court of the Third Circuit in *The Chickie*, 39 Fed. Supp. 200.

2. The decision rendered is of such a nature as to invoke the exercise of this Court's power of supervision in order that shipowners will not be left on an unchartered sea of doubt as to how relief may be sought under the 1936 amendment of this remedial statute which has been given three distinct judicial interpretations by various lower courts. If procedural steps, which necessarily follow the filing of a petition, must be taken or completed within the limited period of six months allowed for the filing of the petition, the necessary effect would be to cut down the privileges of the shipowner by requiring the filing of the petition within a shorter period than that specifically granted by the statute. This would defeat its very purpose. The Congress, as appears from its reports on this amendment, never intended to disturb Rule 51 of the United States Supreme Court Admiralty Rules by fixing an arbitrary time limit for the completion of the various procedural steps which follow the filing of the petition, such as the application for an order for a due appraisement, the judicial inquiry to ascertain the amount of the owner's interest in the vessel and pending freight and the order directing the owner to deposit the amount thereof in court or to secure the same.

WHEREFORE, your petitioners, referring to the annexed brief in support of the foregoing reasons for review, respectfully pray that this Honorable Court issue a writ of certiorari, directing the United States Circuit Court of Appeals for the Second Circuit to certify and send to this Court a full and complete transcript of the record herein,

to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the decree of the Circuit Court of Appeals may be reversed, and that your petitioners may have such other and further relief as to this Honorable Court may seem just.

Dated, May 5, 1944.

BASIL GOULANDRIS, NICHOLAS GOULANDRIS and LEONIDAS GOULANDRIS, doing business as GOULANDRIS BROS.,

Petitioners,

By I. MAURICE WORMSER and
REID, CUNNINGHAM & FREEHILL,
Counsel for Petitioners,
76 Beaver Street,
New York City.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Summary of Argument.

It is our contention that the Circuit Court of Appeals erred in holding that a shipowner's petition for limitation of liability filed within the limited period of six months prescribed in the statute as amended in 1936 (46 U. S. C. 185) is subject to dismissal unless, within said period, at least one of the procedural steps, which necessarily precedes the giving of security, has been taken; and that, in the absence thereof, the petition must be deemed to be a mere notice of intention to initiate a proceeding for limitation of liability at some future date.

Consideration of maritime conditions, particularly such as exist during war time and periods of financial disturbances, coupled with the legislative history of the amendment, impels the conclusion that the statute has been erroneously construed, with the result that petitioners (temporarily deprived of their vessel and the use of their funds in this country because of an act of war and their residence in Greece) have been unjustly denied the right to apply for limitation of their liability.

POINT I.

The language of the statute, read in the light of congressional reports defining the scope of the amendment, reveals that no time limit was intended or specified for compliance with the security provisions of the act or for the initiation of the procedural steps which follow a timely filed petition for limitation of liability. The decision of the court below appears in conflict with those of the Circuit Court of Appeals of the Fourth Circuit.

The District Court construed the statute as imposing an obligation on the petitioners to furnish the limitation

fund within the limited period specified for the filing of the petition. The Court of Appeals seemingly disagreed with that view, for it stated (R. 69):

> "Had the appellants accompanied their petition with an *ad interim* stipulation and prayer for an order approving it, or if within the six months period they had sought to obtain an order for due appraisement of their vessel and her pending freight, it may well be that they would have complied with the statute, although the court's order and the actual furnishing of the limitation fund occurred after expiration of that period. This precise question is not before us and need not be now decided. All we decide is that the petition as filed, with nothing further done within the six months, did not satisfy the statutory requirement."

From the above it is obvious that the Court of Appeals believed that, within the limited period for the filing of the petition, at least one of the procedural steps must be taken, such as obtaining an order for a due appraisement of the owner's interest in the vessel and her pending freight.

The pertinent part of the Statute as amended (46 U. S. C. 185) reads as follows:

> "*The vessel owner,* within six months after * * * written notice of claim, may petition a district court of the United States * * * for limitation of liability * * * *and the owner* (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of Section 183* of this title, or (b)

* Prior to the enactment of this amendment, and in 1935, provision was made under the so-called Sirovich amendment that shipowners should be additionally liable to loss of life and bodily injury claimants until the claimants of that class had had their claims satisfied up to an amount equal to $60 multiplied by the vessels tonnage. Act of August 29, 1935 c. 804; 46 U. S. C. 183.

> at his option shall transfer, * * * to a trustee * * * his interest in the vessel and freight, * * *. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. * * *." (Italics ours.)

The repetition of the words, "the owner," after reference to the time within which "the vessel owner" shall petition the Court, coupled with the failure to add words, such as "during the same period," before stating what security "the owner" shall give to obtain injunctive relief against the prosecution of claims and proceedings, is not without significance and tends to confirm the intention expressed in the Senate and House Report that the six-month period applies only to the filing of the petition. If Congress had any other intention, it would have inserted a phrase such as "during the same period" between the words "the owner" and "shall deposit with the Court."

Both the Senate Report No. 2061 and the House Report, a copy of which appears in the record (R. 54), make it clear that the time limit applies only to the time within which the petition for limitation must be filed and that, with the exception of the other presently immaterial provision relating to claims for loss of life or personal injuries, the amendment in substance follows General Admiralty Rule 51. The House Committee Report, after reviewing the proposed amendment, concludes with the following important and significant statement:

> "With the exception of the provision relating to the time for filing the petition for limitation of liability, and the provision relating to the additional sums which must be turned over, either to the Court or the Trustee, the proposed Amendment in substance follows Rule 51 of the United States Supreme Court Admiralty Rules."

Prior to the 1936 amendment, there was no time limit for the filing of a petition for limitation of liability. Theretofore the owner could wait until after a decree or judgment was had against him before asserting his right to limitation. *Larsen* v. *Northland Transportation Co.,* 292 U. S. 20, 78 L. Ed. 1096. The purpose of the amendment was to correct this mischief by shortening the period within which the right to limit liability could be asserted, so that all claimants could be apprised of the time when such right could no longer exist.

The change in the law wrought by this amendment and the reason therefor have been considered in three decisions of the Circuit Court of Appeals of the Fourth Circuit, in none of which did that court hold that the statute requires anything to be done within the limited period of six months other than to file the petition for liability.

Standard Wholesale P. & A. Works v. *Travelers Ins. Co.,* 107 Fed. (2d) 373;
The Bright, 38 Fed. Supp. 574, affd. 124 Fed. (2d) 45;
The Fred Smartley, Jr., 108 Fed. (2d) 603.

In the latter case the Court said at page 607:

> "Prior to the statute of 1936, there was no time limit for filing the petition for limitation of liability. The owner might wait until after judgment was had against him. Larsen v. Northland Transportation Co., 292 U. S. 20, 54 S. Ct. 584, 78 L. Ed. 1096. That statute, as stated, amended R. S. § 4285 so as to require petitions for limitation of liability to be filed within six months after the filing of written notice of claim, the purpose of the amendment being to require the owner to act promptly if he desires to limit his liability. The Grasselli Chemical Co., No. 4, D. C., 20 F. Supp. 394."

The same conclusion was reached by SCHOONMAKER, *D. J.*, in *The Chickie* (Feb. 7, 1941), 39 Fed. Supp. 200, in which no security was given or any procedural step taken within the limited period for the filing of the petition. There the Court said at page 201:

> "The libellant contends that the petitioners should follow their petition either by depositing in court a sum equal to the amount or value of their interest in the vessel, or approved security therefor, or transfer to a trustee to be appointed by the court, their interest in the vessel. The petition prays the court for the issuance of a monition to all persons claiming damages for all or any losses and damages by, or resulting from, the alleged accident to the dredge 'Admiral,' citing them to appear before a commissioner to be named by the court. The fact that petitioners have not as yet caused a monition to issue, or an order to be made appointing a commissioner in accordance with the petition, does not invalidate the petition or prevent them from proceeding thereunder in accordance with the statute."

A clear distinction exists between the *institution* of a legal proceeding in admiralty and the *various procedural steps* to be *subsequently* taken in order to enable the court to proceed. For instance, under the U. S. Carriage of Goods by Sea Act (46 U. S. C. 1303 [6]), a suit for damage to cargo must be brought within one year after its delivery, yet the mere filing of the libel has been held to be the commencement of a suit although process has not been applied for or served.

> *Oregon Steamship Co.* v. *D/S Hassel* (C. C. A. 2) 137 Fed. (2d) 326, at 329.

This Court has held that a legal proceeding is commenced upon the filing of a petition in good faith within the period of limitation even though process is issued and served after the expiration thereof.

Bates Mfg. Co. v. *U. S.*, 303 U. S. 567; 82 L. Ed. 1020.

A proceeding for limitation of liability is in the nature of a suit in equity, in admiralty, for the object of the statute is to prevent a multiplicity of suits. It is instituted by the filing of a petition. Thereafter, to enable the Court to proceed, a limitation fund must be provided, unless the vessel is lost, without which injunctive relief against claimants may not be granted. See *Providence and N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *Norwich* v. *Wright*, 13 Wall. 104; *Oregon R. R. & Nav. Co.* v. *Balfour*, 90 Fed. 295, at 298.

A limitation proceeding will lie even where there is no fund to be distributed, such as where a vessel on a ballast voyage, without any freight, has disappeared at sea.

The Miramar, 31 Fed. (2d) 767.

The statute under consideration makes it clear that no injunction may issue unless the petition is filed within six months after written claim is made upon the owner and the owner has furnished the required security, for the last sentence thereof reads:

> "Upon compliance with the requirements of this section, all claims and proceedings against the owner with respect to the matter in question shall cease."

We shall demonstrate, when we come to discuss the practice prescribed by the Admiralty Rules, that no order or determination can be made by the Court of the amount of the necessary deposit or security until after the petition is filed and that this naturally would be after the expiration of the six-month period if the owner files his petition on the last day of that period.

Many vital reasons exist for not requiring a shipowner, within the very short period given for filing a petition

for limitation of liability, to surrender his vessel and freight or deposit or secure its value. Since a vessel owner must file a petition within six months after the first written notice of claim is received in order to protect his right to limit liability, it is possible that no further claims may be presented or that a settlement may be made with all claimants. In either event the necessity to prosecute the proceeding and to furnish the required limitation fund would no longer exist. Furthermore, the petition is subject to dismissal where it later appears that the amount of claims is less than the value of the shipowner's interest in vessel or freight. Thus, in *Benedict on Admiralty,* 6th Ed., Vol. 3, Section 480, page 345, it is stated:

> "The bona fides of the shipowner's assertion that he is faced with actual claims, or fears claims, in excess of the value of ship and freight has ordinarily been tested as of the time of the filing of the petition; at that time, of course, apparent defences may exist which may or may not turn out to be good. It has been said that the matter may await the liquidation of the claims, if the face of the asserted claims is less than the stipulated limitation value of the vessel and freight. The time limit imposed by the Amendment of 1936 would seem to compel the shipowner to file his petition within six months nevertheless, but would not appear to affect the power of the court to postpone the disposition of the question of limitation until after the claims have been liquidated and found actually to exceed the amount of the fund."

The maintenance of a limitation proceeding should not be conditioned upon the limitation fund being furnished or procedural steps taken within an arbitrary period, and we submit that the statute may not be so construed. Such matters are governed by General Admiralty Rule 51 of this Court which does not fix any time limit whatever.

POINT II.

A consideration of General Admiralty Rule 51 of this Court, which implements the statute and which Congress expressly declared was substantially followed, demonstrates the error in the decision of the court below.

General Admiralty Rule 51 provides that the shipowner may file a petition

> "setting forth the facts and circumstances on which said limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation with sufficient sureties * * * for the payment thereof into court with interest * * *; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages. * * *"

It was expressly stated in the House Report (R. 54) that, with the exception of the two changes in the 1936 amendment, neither of which relates to the question involved, the statute in substance follows Rule 51 of this Court. The word "thereupon" in Rule 51 means "within a reasonable time."

> *Yuma Water Association* v. *Schlecht*, 262 U. S. 138.

Thus, within a reasonable time after the petition is filed and after the Court has caused a "due appraisement" to be had of the owner's interest in ship and pending freight, an order is made directing the owner to de-

posit the amount thereof in court or to provide security therefor. Neither the due appraisement or order can be had before the petition for limitation is filed. Therefore, if the procedural steps in the proceeding had to be taken and the required security furnished within the same period prescribed for the filing of the petition, a shipowner's right to initiate the proceeding would be lost if he waited until the last hour of the last day to file the petition—a right clearly given by the statute. Bearing in mind the time consumed in obtaining a "due appraisement" which means a "proper inquiry," by the Court, it seems absurd to suggest Congress was not cognizant of this, and if it were, the conclusion is irresistible that the Congress intended procedural steps to be taken and the limitation fund to be ordered and furnished after the expiration of the period allowed for the filing of the petition. Procedural steps, after a petition is timely filed, have always been left to be prescribed by judicial authority.

In *Providence & New York Steamship Company* v. *Hill Manufacturing Co.,* 109 U. S. 578; 27 L. Ed. 1038, the Court stated (p. 1043):

> "We have said that, by the provisions of the Act, the scheme was sketched in outline. A reference to its provisions shows that it was only outlined and that the regulation of details as to the form and modes of proceeding was left to be prescribed by Judicial Authority. * * *"

Both before and after the amendment of this statute in 1936, the rule of procedure, following the filing of a petition for limitation of liability, has been the same—in fact no change was made by this Court. The procedural steps to be taken after a petition has been filed and before security may be posted by a shipowner are well outlined in *Benedict on Admiralty* (published in 1925), 5th Ed., pages 579-602, the pertinent portion of which reads (602):

> "*The surrender or appraisal.* Where the petition asks for an appraisement, the Court on application makes an order for such appraisement. It may join with this order an order for the payment into court of the amount of such value when appraised, or for the giving of a stipulation, with sureties, that such appraised value will be paid into court whenever such payment may be ordered, or the order may be in the first place merely for the appraisal, postponing, till the appraisal has been completed, the order for the payment into court or stipulation. In such case, at least before the latter order is entered, the petitioner may change his mind and surrender the vessel to a trustee."

In *Benedict on Admiralty*, 6th Ed., Volume 3, Sec. 500, published in 1940, no change is indicated with respect to what must be done after a petition is timely filed. The author reiterates (p. 434):

> "The proceedings for the appraisal in order to fix the amount to be paid into court or the amount of the stipulation (proceedings in which the parties to be cited are vitally interested) are preliminary to the payment into court or the giving of a stipulation."

Even if the petitioner chose to file an *ad interim* stipulation pending a formal appraisement, an *ex parte* order must first be obtained, but this cannot be had until after the petition is filed.

> *Hartford Accident Indemnity Co.* v. *Southern Pacific*, 273 U. S. 207, 211.

As to the Form of the Petition.

The Court of Appeals (R. 68-9) commented upon certain prayers for relief in the petition as "peculiar and not in the usual form," because the Court was requested

to cause a due appraisement to be made of petitioners' interest in the vessel and her pending freight, to order security therefor and to issue monitions to claimants, all "upon further application of the petitioners" (R. 11). The sufficiency of the petition was not excepted to by respondents, who merely moved to dismiss upon the ground that there was a failure to furnish the limitation fund within the six month period prescribed in the statute for the filing of the petition (R. 32-8). As appears from the above quoted language from *Benedict on Admiralty*, the application for the appraisement and issuance of monitions to claimants is made by the petitioner, which is in accordance with the usual practice. Therefore, the employment of the phrase "upon further application" was entirely correct, but in any event is immaterial in view of the language of Admiralty Rule 51 which only requires a petition to state "the facts and circumstances on which said limitation of liability is claimed" with a concluding prayer for "proper relief in that behalf."

We know of no authority, and none was cited by the court below, which holds that the form of this petition is insufficient.

The court below assumed that the use of this form defeated the purpose of the statute and rendered it possible for a shipowner to litigate for years with adverse claimants and then infuse life into a dormant proceeding. That assumption is untenable, for practically every District Court has a rule similar to Rule 30 of the General Rules for the United States District Court for the Southern District of New York which authorizes a dismissal of any proceeding instituted in bad faith or where nothing has been done therein within a year after the institution thereof. Thus, the possibility of maintaining a limitation proceeding dormant for years in a remote district without the knowledge of claimants, is fantastic. The possibility of abuse of process could be urged with equa

effect if a shipowner, at the inception of a limitation proceeding, furnished an *ad interim* stipulation or surrendered to a trustee the strippings and pending freight where the vessel was lost or wrecked and did nothing more, for the usual *ex parte* order granting permission to file an *ad interim* stipulation for value is obtainable without notice to claimants and neither that order nor the Admiralty Rules require notice to be given claimants or their proctors within any prescribed period of time. In the ordinary course, claimants would not be notified until after the shipowner had obtained another *ex parte* order appointing a special commissioner to determine the owner's interest in vessel and freight, application for which could be similarly delayed, for again there is no provision in the rules that such order be procured within any time limit after the *ad interim* stipulation is filed.

The form of those two orders, set forth in *Benedict on Admiralty,* 6th Ed., Vol. 3, at pages 436 and 440, and a review of the procedural step to be taken where an *ad interim* stipulation for value is sought to be given (discussed at pp. 432-3 thereof) demonstrate conclusively that delay in notifying claimants is equally possible if a shipowner adopts the *ex parte* method of securing a "due appraisement."

We submit that the court below has erroneously attempted to incorporate into the statute a provision which Congress alone had the power to enact. This may not be done under the guise of construing a statute. As was appropriately observed by this Court in *Viereck* v. *United States,* 318 U. S. 236 at 243:

> "* * * we cannot add to its provisions other requirements merely because we think they might more successfully have effectuated that purpose."

POINT III.

Conditions in shipping and in world trade render it appropriate that the time for completing procedural steps be left to the District Court after the petition is timely filed and are therefore entitled to consideration in any attempt to discover the legislative intent.

The Court may consider as an aid in reaching its decision not only the legislative history of the statute and the particular mischief which it was designed to remedy, but also conditions in the business or trade affected by the statute, which it is only reasonable to assume were known to Congress. Since "Courts are not to shut their eyes to the realities of business life" (CARDOZO, *J.*, in *Barkin Construction Co.* v. *Goodman,* 221 N. Y. 156, 161), the pragmatic approach to the legislative intention is persuasive. A consideration of practical problems that can arise in the shipping trade, particularly in time of war or financial disturbances, which could not be solved unless this decision were reversed, illustrates the wisdom of leaving procedural matters, after a limitation proceeding has been instituted, to the sound discretion of the District Court. (See: POUND, "A Study of Social Interests," Vol. XV, Papers and Proceedings of American Sociological Society, May 1921; CARDOZO, "The Growth of the Law," pp. 85-86; 112-113.)

For instance, in the case at bar, following the outbreak of war between Italy and Greece and before the arrival of this vessel in the United States on May 3, 1941, she had been requisitioned by the Greek Government and chartered in September, 1941, to the British Ministry of War Transport (R. 9),—both of these being events unforeseen and surely unforeseeable by petitioners. Moreover, petitioners were then in Greece and accordingly their funds on deposit in this country were frozen by virtue of an executive order of the President of the United States,

effective April 28, 1941 (R. 55). With no one available in this country with sufficient authority to apply to the Alien Property Custodian for a release of such funds and communication with them rendered impossible, the necessary deposit or security could not be made or given by petitioners within any arbitrary period of time or before the petition was filed (R. 55, 56). *Lex non cogit ad impossibilia.* (Cf. *North German Lloyd* v. *Guaranty Trust Co.*, 244 U. S. 12, 61 L. Ed. 960, and cases there cited.)

Other typical situations are briefly set out which reveal the chaotic conditions that would result under this decision, since statutes, like contracts, must be construed with business sense:

(1) Assuming a vessel departs for foreign ports with cargo before any written notice of claim has been given and is not scheduled to return for eight or ten months, the owner would be compelled, unless he had funds here available, to order the immediate return of his ship upon receipt of a written notice of claim, otherwise the vessel and freight could not be surrendered to a trustee before the expiration of the time for filing the petition and in doing so would be chargeable with a deviation with respect to the cargo then on board and destined for other ports.

(2) Assuming the shipowner is a foreigner with no funds immediately available in this country and his vessel (after leaving here for foreign ports and before any written notice of claim had been given) has been seriously damaged or sunk, he would be deprived of limitation if within the six-month period he were unable for any reason to make the necessary deposit or to give security therefor. The fact that he has sufficient funds abroad which might subsequently be available would be no excuse and his timely petition would be dismissed.

(3) Assuming an owner filed his petition on the last day of the statutory period but could not obtain an *ex parte*

order approving an *ad interim* stipulation for value because no judge was available to sign it, with the consequence that the *ad interim* stipulation for value could not then be approved and filed, would the proceeding be invalidated? Respondent's counsel in the court below urged that it would be.

(4) Assuming an owner, during the six-month period, deposited in court or gave security for an inadequate amount based on an erroneous estimate of his interest in the vessel and freight, is he foreclosed from limiting his liability? If respondents' contention be correct, the petition must be dismissed because the deposit or security was not for "a sum equal to the amount or value" of the petitioner's interest in vessel and freight. Good faith would be inexcusable if the time for making the correct deposit be a jurisdictional requirement of the statute.

Adequate relief against such emergencies or contingencies could be granted by the Courts if, as we earnestly believe, the Congress intended to leave procedural matters to be governed by the discretionary power of the District Court within the framework of General Admiralty Rule 51.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals of the Second Circuit should be granted.

Dated, May 5, 1944.

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New York City.

(34)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 974

BASIL GOULANDRIS, NICHOLAS GOULANDRIS and LEONIDAS GOULANDRIS, doing business as Goulandris Bros.,

Petitioners,

—against—

THE AMERICAN TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY, LIGGETT & MYERS TOBACCO COMPANY, INC., BANK OF GREECE, LEKAS & DRIVAS, INC., POMPEIAN OLIVE OIL CORPORATION, and VICTOR CORY, an individual doing business as Victor Cory Company,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

The question upon which the petitioners would have this Court pass is a simple one as disclosed by the opinion of the District Court (R., p. 42), the opinion of the Circuit Court of Appeals (R., p. 64), and by the arguments advanced in the petitioners' petition and brief: May a vessel owner defeat the whole purpose of the 1936 amendment of the limited liability statute (46 U. S. C. A. 185), by secretly filing a document described as a petition for limitation of liability but which by its terms merely gives notice that the petitioners may in the future ask for limitation of liability, and which is not accompanied by any security except for costs, or any surrender

of the vessel and her pending freight or an offer to surrender the value of the vessel and her pending freight?

As the Circuit Court of Appeals pointed out (R., p. 69, note 3), a petition for limitation may be filed not only in the District where suit may have been filed against the vessel owner but also in any District where the vessel herself may be located. Under petitioners' argument, while a cargo owner and a vessel owner are actively litigating their rights in a suit filed by the cargo owner in the Southern District of New York, a petition which the vessel owner may have secretly filed say in the Northern District of California, without any accompanying security, may be lying dormant but, when petitioners' interests make it desirable after the cargo owners have successfully established the vessel owner's liability in the New York suit, the dormant proceedings in California may be revived years later by filing security and the New York proceedings brought to an end by injunction in the San Francisco limitation proceedings.

The circumstances of the present case show the enormity of petitioners' argument. Libel by the cargo owners (respondents here) against the petitioners was filed in the Southern District of New York on May 15, 1941 (R., p. 5). Answer to the libel was filed by the petitioners (R., p. 34) and a number of witnesses were examined by deposition at great length (R., p. 37). Without notice to or knowledge of the libellants in the suit mentioned the alleged petition for limitation now presented for consideration, was filed in the Southern District of New York on November 3, 1941. Although it is set out in the alleged petition that the value of the vessel was a large sum ("not in excess of $359,000") and the pending freight is set out as $298,698.20 (R., p. 9), no security (except for costs) was filed or offered.

Because, in December 1942, a diligent clerk in the office of proctors for the present respondents noted an entry of this petition on the Southern District of New York calendar of cases to be considered for dismissal because of non-prosecution, and his interest in ascertaining if this proceeding had any relation to the suit he knew was pending against the petitioners, present respondents learned, for the first time, of the existence of the alleged petition. It seems apparent that the petitioners proposed to permit the alleged petition to remain dormant unless the outcome of the active suit should make revival worth while.

Not only was no security filed or offered with the alleged petition for limitation within the six months period—it never has been filed or offered at any time.

If this Court has any doubt of the law as laid down by the District Court and the Circuit Court of Appeals in this case, respondents join with the petitioners in asking that the petition be granted and that all doubts be removed. Respondents submit, however, that the facts and the applicable law reviewed in the opinion of the Circuit Court of Appeals, show a case singularly free from doubt.

The opinion of the Circuit Court of Appeals sets out respondents' position so clearly that we see no reason to add anything further.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1943

No. 974

BASIL GOULANDRIS, NICHOLAS GOULANDRIS and LEONIDAS GOULANDRIS, doing business as GOULANDRIS BROS.,
Petitioners,

against

THE AMERICAN TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY, LIGGETT & MYERS TOBACCO COMPANY, INC., BANK OF GREECE, LEKAS & DRIVAS, INC., POMPEIAN OLIVE OIL CORPORATION, and VICTOR CORY, an individual doing business as VICTOR CORY COMPANY,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITIONERS' WRIT OF CERTIORARI

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CORPORATE PRESS, INC., NEW YORK CITY

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OCTOBER TERM, 1943

BASIL GOULANDRIS, NICHOLAS GOULANDRIS and LEONIDAS GOULANDRIS, doing business as GOULANDRIS BROS., *Petitioners,* against THE AMERICAN TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY, LIGGETT & MYERS TOBACCO COMPANY, INC., BANK OF GREECE, LEKAS & DRIVAS, INC., POMPEIAN OLIVE OIL CORPORATION, and VICTOR CORY, an individual doing business as VICTOR CORY COMPANY, *Respondents.*	No. 974

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Respondents, with amazing indifference to the record, challenge petitioners' good faith in initiating the proceeding for limitation of their liability. The record is devoid of any suggestion that the petition was "secretly" filed or that respondents only learned of it for the first time in December, 1942. The failure to support these unwarranted statements by appropriate reference to the record, is indicative of an adroit attempt to gloss over the variety of interpretations given by courts of different circuits to the statute under consideration which are wholly ignored in respondents' brief.

It is undisputed and the court below so found, that petitioners, residents of Greece, were unable either to sur-

render their vessel, because it "had been requisitioned by the Greek Government" upon the outbreak of war with the Axis powers or to post security for its value "since their funds in the United States had been 'frozen' by a Presidential Order effective April 28, 1941" (R. 68). Thus there is utterly no basis for respondents' inference (p. 3) that petitioners apparently intended to keep the limitation proceeding dormant "unless the outcome of the active suit should make revival worth while." Incidentally the trial of respondents' cargo damage suits was, upon their consent, successively stayed to March 1, 1943 (37), then to June 1, 1943 (39) and, since the record was printed, to the fall of 1944. These stays were granted for the obvious reason that the issues cannot be tried until Greece is liberated and witnesses now in that unfortunate country are available to give testimony.

Respondents' reference (p. 2) to the possibility of injustice resulting in a hypothetical case if a shipowner could institute a limited liability proceeding in a remote district and keep it dormant for years while defending suits of cargo claimants in another district, is wholly irrelevant but in any event, is fantastic because of Admiralty Rule 54 of this court, which deals with venue of limitation proceedings and the general rules of various district courts which authorize a dismissal of any proceeding instituted in bad faith or where nothing has been done therein within a period of one year. Admiralty Rule 54 of this court permits a shipower to institute a limitation proceeding in a district to which the vessel might be brought only if the vessel has not been previously "libeled to answer" in another district for claims involved. If the vessel has not been libeled but the owner has been previously sued *in personam* in a district while the vessel was there, then a limitation proceeding may not be instituted in another district to which she may subsequently be brought. *Petition*

of M. C. Butcher, et al., Owners of the Barges "Sun" and "Star," for Exoneration from or Limitation of Liability, 52 F. Supp. 385.

The apprehensions of respondents' counsel are needless and must, in the light of the foregoing rules, be viewed with robust skepticism.

Dated, May 22, 1944.

Respectfully submitted,

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